

Jon M. Sands  
Federal Public Defender  
District of Arizona  
Nicole List (HI No. 10077)  
Kush Govani FP022 (AZ No. 032425)  
Assistant Federal Public Defenders  
850 West Adams Street, Suite 201  
Phoenix, Arizona 85007  
[nicole\\_list@fd.org](mailto:nicole_list@fd.org)  
[kush\\_govani@fd.org](mailto:kush_govani@fd.org)  
602.382.2816 Telephone  
602.889.3960 Facsimile

Mark Brnovich  
Attorney General  
Elizabeth Bingert (AZ No. 030277)  
Assistant Attorneys General  
Capital Litigation Section  
2005 N. Central Avenue  
Phoenix, Arizona 85004  
602-542-4686 Telephone  
[CLDocket@azag.gov](mailto:CLDocket@azag.gov)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Michael Gallegos,  
Petitioner,  
vs.  
David Shinn, Director, Arizona  
Department of Corrections,  
Rehabilitation & Reentry, et al.,  
Respondents.

No. CV-01-01909-PHX-NVV

**DEATH-PENALTY CASE**

**Joint Proposed Prehearing Order**

The following are prehearing proceedings in this case as agreed to by the parties and approved by the Court:

1           **I. BRIEF DESCRIPTION OF THE CLAIM**

2           Petitioner Michael Gallegos has alleged that he was deprived of his Sixth  
 3 Amendment Right to effective assistance of counsel during his capital resentencing  
 4 hearing and post-conviction proceedings. The claim of ineffective assistance of  
 5 counsel substantially derives from the failure of both the resentencing counsel and  
 6 the post-conviction counsel to investigate and present mitigating evidence of  
 7 Gallegos's brain damage and/or brain impairment. Petitioner contends that the  
 8 scope of this hearing also encompasses any adverse developmental consequences,  
 9 as well as its explanatory role in the offense. This Court has already determined that  
 10 there is cause and prejudice to excuse procedural default of the ineffective-  
 11 assistance claim against resentencing counsel. (ECF No. 160 at 17.) The Court  
 12 found that an evidentiary hearing is necessary to determine whether Gallegos is  
 13 entitled to relief on the merits of his claim of ineffective assistance of resentencing  
 14 counsel. (ECF No. 160 at 21.) In order to obtain relief, Petitioner must demonstrate  
 15 in accord with *Strickland v. Washington*, that counsel failed to act "reasonabl[y]"  
 16 under prevailing professional norms," 466 U.S. 668, 688 (1984) and that there is a  
 17 "reasonable probability that, but for counsel's unprofessional errors, the result of  
 18 [Petitioner's capital sentencing] proceeding would have been different." *Id.* at 694.

19           **II. STIPULATIONS**

20           The parties stipulate to the following:

- 21           • The parties stipulate that the issue for this Court to determine is  
                   whether resentencing counsel performed in a constitutionally deficient  
                   manner and whether Petitioner was prejudiced thereby.
- 22           • The parties stipulate that no additional foundation will be required for  
                   the admission of any exhibits.
- 23           • The parties stipulate that the transcripts of the witness interviews and  
                   depositions will be marked as exhibits, but will be used solely for the  
                   purposes of impeachment.

- 1     • The parties stipulate to the admission of the 2020 declarations of
  - 2                 Ms. Statia Peakheart and Mr. Aaron Barrett.
  - 3     • The parties stipulate that the following individuals are experts in the
  - 4                 areas specified:
    - 5                 ○ Dr. Corwin Boake – neuropsychology
    - 6                 ○ Dr. David Fassler – child and adolescent psychiatry
    - 7                 ○ Dr. Robert Heilbronner – neuropsychology
    - 8                 ○ Dr. Daniel Reschly – psychologist with specialization in
    - 9                         learning disabilities and special education
  - 10    • The parties stipulate that Gallegos suffered from learning disabilities.
  - 11    • The parties stipulate that Gallegos had substance abuse issues.
  - 12    • The parties stipulate that the ATC/ATV accidents did in fact occur.

### III. UNCONTESTED FACTS

14 The following material facts are uncontested:

- The 8-year-old victim, K.W., lived with her mother, Cynthia Wishon, and Petitioner’s brother Jerry Gallegos, Jr. (Gallegos Jr.) in Phoenix. In November 1989, the victim’s half-brother, George Smallwood, moved to Flagstaff to live with Petitioner and Petitioner’s family. Petitioner’s parents became Smallwood’s legal guardians. Petitioner and Smallwood were friends and attended high school together. (ECF No. 111 at 2.)
  - On March 15, 1990, Petitioner and Smallwood drank throughout the day. (ECF No. 111 at 2–3.)
  - Petitioner suggested that they go into the victim’s room to fondle her; Smallwood agreed. Once they were inside the victim’s room, Petitioner lifted her nightgown and rubbed baby oil on the small of her back. (ECF No. 111 at 3.)

- 1       • According to Petitioner, when K.W began to awaken, Smallwood put  
2                  his hand over her mouth and Petitioner put his hand over Smallwood’s  
3                  hand and over the victim’s nose. She gasped for air, struggled, and  
4                  made sounds “like a little pig” before eventually going limp. (ECF No.  
5                  111 at 3.)
- 6       • Petitioner then had anal intercourse with her for 15 to 20 minutes.  
7                  Smallwood likewise performed sex acts on K.W.’s dead body. (ECF  
8                  No. 111 at 3.)
- 9       • The two carried the victim’s naked body out of the house and down  
10                 the street where they dropped it under a tree. They returned to the  
11                 house and went to bed. (ECF No. 111 at 3.)
- 12      • After speaking with Petitioner, Smallwood reported the victim missing  
13                 to the victim’s mother and to the police. (ECF No. 111 at 3.)
- 14      • Petitioner and Smallwood participated in the search for the victim but  
15                 deliberately avoided the area where they had dropped the victim’s  
16                 body.
- 17      • At around 1:00 p.m., an unidentified boy alerted the police as to the  
18                 body’s location. The police found the victim’s naked body under the  
19                 tree where it had been left the night before.
- 20      • Physical evidence and forensic analyses corroborated Petitioner’s  
21                 account of events. (ECF No. 111 at 4–5.)
- 22      • Petitioner testified at trial that he participated in the victim’s death; he  
23                 maintained he was drunk and did not intend to kill her. (ECF No. 111  
24                 at 5.)
- 25      • Gallegos was convicted in the Maricopa County Superior Court of  
26                 first-degree murder and sexual conduct with a minor on March 14,  
27                 1991. (ROA 118 at 2.)<sup>1</sup> He was sentenced to consecutive sentences of

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28      <sup>1</sup> When counsel is referring to the state court record, reporter’s transcripts are

1 death and twenty years, respectively. (ROA 135 at 2–3.) The trial court  
 2 found in aggravation that the murder was committed in a heinous, cruel  
 3 or depraved manner, and that the victim was under 15 years old. The  
 4 trial court found the statutory mitigating circumstance that Petitioner  
 5 was 18 years old when he committed the offenses, and the non-  
 6 statutory mitigating circumstances that he was remorseful and the case  
 7 detectives recommended leniency. (ECF No. 111 at 6.)

- 8 • On March 15, 1994, the Arizona Supreme Court affirmed Gallegos’s  
   9 convictions and twenty-year sentence, but remanded the case for  
 10 resentencing on the first-degree murder conviction. *State v. Gallegos*  
 11 (*Gallegos I*), 870 P.2d 1097, 1117–19 (Ariz. 1994).
- 12 • After the completion of the resentencing hearing, the trial court once  
   13 again imposed death on October 24, 1994. (ROA 164 at 5.) The trial  
   14 court found Petitioner’s impairment and history of alcohol and drug  
   15 abuse constituted additional non-statutory mitigating circumstances.  
   16 (ECF. No. 111 at 6.)
- 17 • On May 3, 1996, the Arizona Supreme Court affirmed Gallegos’s  
   18 sentence. *State v. Gallegos (Gallegos II)*, 916 P.2d 1056 (Ariz. 1996).
- 19 • On March 29, 1999, Gallegos filed his petition for post-conviction  
   20 relief (ROA 188), and filed a supplemental petition for post-conviction  
   21 relief (ROA 204) on October 8, 1999.
- 22 • After conducting an evidentiary hearing (ROA 225), on January 4,  
   23 2001, the post-conviction court denied Gallegos’s petition (ROA 227).

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24 designated “Tr.” followed by the relevant date and page number. Indexed  
 25 documents from the record on appeal are designated “ROA” followed by the docket  
 26 number and relevant page number. Documents from the petition for review  
 27 proceedings are designated “PFR” followed by the docket number and relevant  
 28 page number. Documents from the District Court docket are designated as “ECF  
   No.” followed by the docket number and page number. Documents from the Ninth  
   Circuit Court of Appeals are designated “9th Cir. ECF No.” followed by the docket  
   number and page number.

- Gallegos filed a petition for review (PFR 1), which the Arizona Supreme Court denied on October 5, 2001 (PFR 12).
  - On December 4, 2002, Gallegos filed in this Court an amended habeas petition. (ECF No. 74.) In his petition, Gallegos argued that his counsel was ineffective for not sufficiently developing evidence of his history of drug and alcohol abuse, his tendency to be a follower, and his learning disability. (ECF No. 74 at 68–77.)
  - On September 29, 2008, this Court denied Gallegos’s amended habeas petition, finding that his claim of ineffective assistance of counsel had been exhausted but failed on the merits. (ECF No. 111 at 35–47.) This Court also denied Gallegos’s request for evidentiary development. (ECF No. 106.)
  - Gallegos appealed this Court’s denial of his habeas petition to the Ninth Circuit Court of Appeals and following the Supreme Court opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), Gallegos moved for a stay and partial remand in light of this decision. (9th Cir. ECF No. 46-1.) In his motion, Gallegos presented a report from Dr. Robert L. Heilbronner, who evaluated Gallegos and concluded that there is “objective evidence of cognitive dysfunction reflecting brain-based disturbances in functioning.” (9th Cir. ECF No. 46-2 at 7 (emphasis omitted).) Dr. Heilbronner determined that Gallegos’s “brain damage was present at the time he committed the crimes” and “compromised his capacity to inhibit and/or control his behavior at the time of the offense and also made him susceptible to the influence of others.” (9th Cir. ECF No. 46-2 at 7.)
  - The Ninth Circuit affirmed this Court’s denial of Gallegos’s habeas petition, but granted in part Gallegos’s motion seeking a remand for consideration of a newly discovered *Brady* claim. *Gallegos v. Ryan*,

1                   820 F.3d 1013 (9th Cir. 2016). The court initially denied Gallegos’s  
2                   *Martinez* motion. *Id.* at 1015–16.

- 3                   • After Gallegos sought reconsideration of the court’s decision to deny  
4                   his request to pursue his unexhausted claim of ineffective assistance of  
5                   counsel for failing to investigate and present evidence of brain damage  
6                   (9th Cir. ECF No. 75-1), the Ninth Circuit granted Gallegos’s Petition  
7                   for Panel Rehearing and granted in part Gallegos’s *Martinez* motion.  
8                   *Gallegos v. Ryan*, 842 F.3d 1123 (9th Cir. 2016). The court ordered:

9                                  On remand, the District Court shall consider  
10                                 Gallegos’s timely *Martinez* claim and, accordingly,  
11                                 determine whether he can show cause and prejudice  
12                                 to excuse the procedural default with respect to his  
13                                 claim that counsel failed to investigate and present  
14                                 mitigating evidence of Gallegos’s alleged organic  
15                                 brain damage. *See Dickens v. Ryan*, 740 F.3d 1302,  
16                                 1320 (9th Cir. 2014) (en banc).

17                                 *Id.* at 1123.

- 18                   • This Court subsequently set a briefing schedule, ordering Gallegos to  
19                   file a supplemental brief on whether cause and prejudice exist to  
20                   excuse the procedural default of his “claim that counsel failed to  
21                   investigate and present mitigating evidence of Gallegos’s alleged  
22                   organic brain damage.” (ECF No. 147 at 8–9.)  
23                   • After briefing was complete, the Court issued an order granting an  
24                   evidentiary hearing to determine whether resentencing counsel  
25                   performed ineffectively under *Strickland* by failing to present evidence  
26                   that Gallegos suffered from organic brain damage. (ECF No. 160.)

27                   **IV. UNCONTESTED ISSUES OF LAW**

28                   The parties agree that this case is not governed by AEDPA and that this

1 Court's review of the issues of ineffective assistance of resentencing counsel is *de  
2 novo*.

3 **V. CONTESTED ISSUES OF FACTS AND LAW**

4 The following are material issues to be tried and decided:

5 **A. Did resentencing counsel have knowledge, information, or  
6 evidence that Gallegos, who committed the crime at age eighteen,  
7 might suffer from organic brain damage and/or brain  
impairment?**

8 Petitioner contends: Yes. John Antieau, Gallegos's resentencing counsel,  
9 possessed substantial and specific evidence indicating that Gallegos suffered from  
10 organic brain damage and brain impairment. By the time of resentencing, there were  
11 red flags indicating that Gallegos had suffered serious head injuries and had  
12 accompanying cognitive impairments.

13 In regards to head injuries, Antieau had notes indicating that Gallegos had  
14 suffered a "serious accident" as a passenger in an All Terrain Cycle ("ATC"), after  
15 which he was "dazed" all night. (ECF No. 152-8 at 35; ECF No. 152-8 at 41.) The  
16 crash paralyzed the driver. (ECF No. 152-8 at 41.) Another witness corroborated  
17 Gallegos's presence in the accident and that afterwards he was in shock and pale.  
18 (ECF No. 152-8 at 50.) Antieau had information that three more friends likely knew  
19 about the ATC accident. (ECF No. 152-8 at 56–57.) He also had information from  
20 both of Gallegos's parents confirming his involvement in an ATC accident, with  
21 his mother stating Gallegos had chipped his tooth in the accident. (ECF No. 152-8  
22 at 30; ECF No. 152-8 at 66.)

23 In addition to the head injuries, Antieau possessed information that Gallegos  
24 suffered from cognitive impairments. He was learning disabled in all subjects  
25 starting in second grade. (ECF No. 152-8 at 65; ROA 127 at 169; ROA 131 at 7, 8.)  
26 Multiple witnesses commented on Gallegos's lack of maturity, with Phoenix police  
27 detective Michael Chambers testifying, "His age is still a question in mind. . . . I'm  
28 not certain of his—his actual maturity. My impressions in my brief contact with this

1 young man was of him, one, being unsophisticated, and, two, being at some point  
 2 less than his chronological age[]” of 18 years old. (Tr. 5/24/1991 at 39–40; ROA  
 3 131 at 10.) Gallegos’s juvenile probation officer, Noah Stalvey, testified that he  
 4 “has apparently not developed the ability to think before he acts. . . .[he] tends to  
 5 act impulsively and allow[s] himself to become involved in a situation without  
 6 considering the consequences. . . . [his] actions do not appear to be vicious, just  
 7 thoughtless.” (Tr. 5/24/1991 at 15.) He added that when Gallegos “got into trouble,  
 8 it was due to his impulsivity and the fact that he did not consider the consequences  
 9 for his actions.” (ROA 131 at 6.) Gallegos also “did not seem to have the cognitive  
 10 ability to grasp the limits [of probation].” (ROA 131 at 5.)

11 Antieau possessed ample, concrete evidence suggesting that Gallegos  
 12 suffered head injuries and attendant cognitive deficits, which should have indicated  
 13 to Antieau that Gallegos might suffer from organic brain damage or brain  
 14 impairment. *See Sections V.B.–V.C., infra.*

15 Respondents contends:

16 No. Resentencing counsel presented all of the information he had at his  
 17 disposal regarding Petitioner’s brain *impairment*. Antieau was aware, and it was  
 18 well-established in the record, that Petitioner suffered from lifelong learning  
 19 disabilities. That is not disputed. What is disputed is whether Antieau had  
 20 knowledge, information, or evidence that Petitioner suffered from *brain damage*.  
 21 Antieau had trial counsel Greg Clark’s file to review. In that file was Dr. John  
 22 DiBacco’s report when the trial court appointed him to evaluate Petitioner in 1991.  
 23 DiBacco’s evaluation spanned two days and included a battery of psychological  
 24 tests. Nothing in that testing prompted DiBacco to request additional medical  
 25 testing or evaluation. DiBacco noted that at the time of the interview, Petitioner  
 26 took Motrin for back pain as the result of an ATV accident, but that Petitioner  
 27 otherwise denied any significant physical problems.

28 The evidence will show that based on prevailing professional norms, and the

1 what was accepted in the scientific community at the time of Petitioner's  
 2 resentencing, it was reasonable not to inquire further about brain damage  
 3 contributing to Petitioner's actions.

4       **B. At the time of Gallegos's resentencing, what were the prevailing  
 5 professional norms in cases where counsel had evidence that the  
 6 client might suffer from cognitive deficits and/or impaired brain  
 7 function?**

8       Petitioner contends: Under *Strickland v. Washington*, 466 U.S. 668 (1984)  
 9 whether defense counsel's performance satisfies the requirements of the Sixth  
 10 Amendment turns on an assessment of whether that performance was reasonable  
 11 under prevailing professional norms. It is undisputed that at the time of the  
 12 Petitioner's resentencing in 1994, under prevailing professional norms, capital  
 13 counsel was required to conduct a sufficient investigation and engage in sufficient  
 14 preparation to be able to present and explain the significance of all available  
 15 mitigating evidence. See *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Wiggins v.*  
 16 *Smith*, 539 U.S. 510, 524 (2003); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per  
 17 curiam). Pointedly, the sentencing proceedings in *Williams*, *Wiggins*, and *Porter* all  
 took place prior to Petitioner's resentencing in 1994.<sup>2</sup>

18       Similarly, it was well established by 1994 that under prevailing professional  
 19 norms, when there are indications that a client might suffer from brain impairment  
 20 or other mental deficiency those leads must be investigated. See *Williams*, 529 U.S.  
 21 at 396; *Porter*, 558 U.S. at 39–40; *Wiggins*, 539 U.S. at 524. The cases in this Circuit  
 22 have long ago buttressed this point. *Evans v. Lewis*, 855 F.2d 631, 636–37 (9th  
 23 Cir.1988); *Caro v. Woodford*, 280 F.3d 1247, 1250, 1255 (9th Cir. 2002) (finding  
 24 deficient investigation into Caro's possible brain impairments, in a case tried in  
 25 1981). “We have repeatedly held that counsel may render ineffective assistance if  
 26 he ‘is on notice that his client may be mentally impaired,’ yet fails ‘to investigate

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27       <sup>2</sup> *Williams*, *Porter*, and *Wiggins* were tried in 1986, 1987, and 1989, respectively.  
 28 *Williams v. Commonwealth*, 360 S.E.2d 361 (Va. 1987); *Porter v. State*, 564 So. 2d  
 1060 (Fla. 1990); *Wiggins v. State*, 597 A.2d 1359 (Md. 1991).

1 his client's mental condition as a mitigating factor in a penalty phase  
 2 hearing....” *Id.* at 1254 (quoting, *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th  
 3 Cir. 1995)).

4 Therefore, under prevailing professional norms in 1994, it is undisputed that,  
 5 absent a reasonable strategic reason for not doing so, indications of possible mental  
 6 disability or brain impairment had to be thoroughly explored.

7 Respondents contends:

8 The Supreme Court set forth the clearly established federal law governing  
 9 ineffective assistance of counsel claims in *Strickland*. *Cullen v. Pinholster*, 563 U.S.  
 10 170, 189 (2011). To obtain relief, a petitioner must show that “counsel’s conduct  
 11 so undermined the proper functioning of the adversarial process that the trial cannot  
 12 be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. He must  
 13 satisfy both prongs of *Strickland*’s test by demonstrating that (1) counsel’s  
 14 performance was deficient under prevailing professional standards and (2) he  
 15 suffered prejudice as a result. *Id.* at 687–88.

16 Here, Petitioner contends that because counsel for the sentencing phase did  
 17 not hire an expert to determine whether Petitioner suffered from “organic brain  
 18 damage” due to unsubstantiated traumatic brain injuries, his counsel was  
 19 ineffective. Petitioner also contends that the evidence provided to resentencing  
 20 counsel from the Arizona Capital Representation Project was so obvious that any  
 21 attorney would see the need to have him evaluated for brain damage. However, as  
 22 the evidence in this hearing will demonstrate, no one in Petitioner’s family, circle  
 23 of friends, juvenile probation team, teachers, attorneys, or counselors, thought  
 24 enough of these ATV accidents to raise concerns. No one articulated that  
 25 Petitioner’s behavior changed after the accidents, that his drug use increased or  
 26 subsided, or that he became less cognitively astute. Nothing in the materials from  
 27 Ms. Nowatzki to Mr. Antieau indicated that these ATV incidents raised red flags  
 28 for her. The issues that remained a constant concern for all of the people in

Petitioner's life were his heavy substance abuse and association with George Smallwood. Moreover, the hearing will demonstrate the lack of objective, credible evidence that Petitioner ever suffered from concussion or traumatic brain injury, thus undermining Petitioner's claim that he has brain damage. *Strickland* makes clear that “[t]hese standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case.” 466 U.S. at 669.

Petitioner argues that Antieau failed to meet the prevailing professional norms when he did not call a mental health expert to testify in person. However, consultations with other counsel during the Arizona Capital Representation Project's work on the case revealed that other attorneys would only call a psychologist “presumably if he had anything positive to say.” Therefore, it was not unreasonable for Antieau to have submitted expert reports in lieu of testimony.

Petitioner also cites to the ABA guidelines as the prevailing professional norm. The guidelines do not constitute bright line standards for reasonable performance: “No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Strickland*, 466 U.S. at 688–89; *see also Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (“*Strickland* stressed . . . that [ABA] standards and the like are only guides to what reasonableness means, not its definition. We have since regarded them as such”); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (court has “declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms”).

Likewise, Petitioner criticizes Mary Durand's work on his case. However, defendants do not have a constitutional right to a mitigation specialist and counsel is not required to employ such individuals. *Jells v. Mitchell*, 538 F.3d 478, 495 (6th Cir. 2008); *see also Phillips v. Bradshaw*, 607 F.3d 199, 207–08 (6th Cir. 2010)

1 (stating, “hiring a mitigation specialist in a capital case is not a requirement of  
 2 effective assistance of counsel”); *People v. Burt*, 658 N.E.2d 375, 389 (Ill. 1995)  
 3 (mitigation specialists, called “mitigation experts” in the opinion, not  
 4 constitutionally required). As a result, defendants have no right to a competent  
 5 mitigation specialist. *See State v. Herring*, 28 N.E.3d 1217, 1239, ¶ 113 (Ohio 2014)  
 6 (“It is true that [Defendant] did not have a constitutional right to a mitigation  
 7 specialist or a right to an effective one.”).

8       Further, counsel retained expert Dr. Charles Shaw, who was employed at St.  
 9 Luke’s Behavior Health Center at the time of Petitioner’s evaluation. The Court had  
 10 also appointed John Dibacco in 1991 to conduct a psychological evaluation as to  
 11 whether at the time of the offense, “the defendant’s capacity to appreciate the  
 12 wrongfulness of his conduct, or to conform his conduct to the requirements of law  
 13 was significantly impaired, but not so impaired as to constitute a defense to  
 14 prosecution.” Clearly, these experts were trained to screen for the presence of  
 15 psychological disorders and would have alerted the court and counsel if they made  
 16 findings that were out of the ordinary or required additional testing.

17       **C. Was counsel’s pre-resentencing investigation objectively  
 18 unreasonable under prevailing professional norms?**

19       Petitioner contends: Yes. As explained above in Section V.B, it is  
 20 indisputable, that under professional norms prevailing in 1994, indications of  
 21 possible mental disability or brain impairment had to be thoroughly explored.  
 22 Resentencing counsel failed in this essential task.

23       Antieau’s failure to discharge his duties in this case occurred within a larger  
 24 context of inexperience and questionable professional conduct. First, Antieau was  
 25 an appellate attorney; he did not have adequate experience in capital sentencing  
 26 litigation. (ECF No. 152-8 at 25.) Before Gallegos’s resentencing, he had only  
 27 represented one client during a capital sentencing. *See Min. Entry Order, State v.*  
*Romanosky*, No. CR158333 (Maricopa Cty. Super. Ct. Dec. 13, 1989) (appointing

1 Antieau to represent defendant during retrial). Gallegos's trial counsel, Greg Clark,  
 2 communicated to Antieau his concerns about Antieau remaining on the case and  
 3 told him that he should withdraw from the case because of his inexperience with  
 4 capital trials and sentencing. (ECF No. 153-1 at 75.) Antieau seemed to share  
 5 Clark's concerns but failed to act on them. (ECF No. 153-1 at 75.)

6 Antieau's severe alcoholism also interfered with his representation.  
 7 (ECF No. 153-1 at 90.) On his death certificate issued in 2000, one listed cause of  
 8 death is alcoholism that lasted for thirty years. (ECF No. 152-10 at 111.) This  
 9 coincides with his representation in Gallegos's case. That his alcoholism  
 10 undermined his professional duties was apparent to both former trial counsel and  
 11 his investigator for the resentencing. (ECF No. 153-1 at 90.) Clark stated that when  
 12 Antieau came to discuss Gallegos's case, he appeared hungover or still intoxicated.  
 13 (ECF No. 153-1 at 75.) He would ask questions after they had already been  
 14 answered. (ECF No. 153-1 at 75.)

15 Antieau also had a non-existent relationship with Gallegos. After Gallegos's  
 16 death sentence was initially overturned, Antieau only visited him one time.  
 17 (ECF No. 153-1 at 138.) Antieau was never available to answer Gallegos's phone  
 18 calls. (Tr. 12/1/2000 at 83.)<sup>3</sup> At one point, Gallegos—recognizing he had been  
 19 abandoned—wrote a letter to the judge, voicing his concerns about Antieau's  
 20 representation. (Tr. 12/1/2000 at 83–84.) He wrote about how Antieau failed to  
 21 communicate with him and that Gallegos did not know what Antieau's mitigation  
 22 strategy at resentencing would be.<sup>4</sup> Antieau's inexperience, his alcoholism, and his

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23  
 24 <sup>3</sup> Antieau's insufficient communication with clients was not limited to his  
 25 interactions with Gallegos. Antieau was informally reprimanded and placed on  
 26 probation by the Arizona State Bar for “fail[ing] to respond to a client's repeated  
 27 request for information necessary for the client to proceed[.]” (ECF No. 152-10 at  
 28 47.) In response to another complaint, Antieau was informally reprimanded and  
 placed on probation for “failure to appear at a scheduled hearing, combined with  
 his failure to thereafter communicate with the client in a timely manner as requested  
 by the client[.]” (ECF No. 152-10 at 58.)

<sup>4</sup> While the letter is not contained in the record, Gallegos testified about its contents

1 refusal to communicate with Gallegos all contributed to an otherwise  
 2 constitutionally unreasonable and ineffective representation.

3       Ultimately, Antieau was in possession of unequivocal evidence that would  
 4 have prompted reasonable counsel to conduct an investigation. The investigation  
 5 would have led to the discovery that Gallegos suffers from significant brain and  
 6 associated cognitive impairments, which, along with the additional mitigating  
 7 evidence, would have engendered a reasonable probability for a life sentence. *See*  
 8 Section V.D, *infra*.

9       The records provided to Antieau by the Arizona Capital Representation  
 10 Project (“AZCAP”) put him on notice that Gallegos had suffered repeated head  
 11 injuries, making it *plausible* that he may have sustained damage to his brain. *See*  
 12 Section V.A, *supra*. As an obvious first step, Antieau should have consulted and  
 13 communicated with Gallegos about the accidents and injuries to his head and brain.  
 14 *See Strickland*, 466 U.S. at 688, 691 (recognizing importance of communicating  
 15 with client). Had he taken the simple step of communicating with Gallegos, he  
 16 would have learned that Gallegos lost consciousness on several occasions after  
 17 sustaining injuries to his head. (ECF No. 152-6 at 26; ECF No. 153-1 at 136–37.)  
 18 This evidence would have rendered it even more plausible that Gallegos may have  
 19 sustained a brain injury, and ““the known evidence would [have] le[d] a reasonable  
 20 attorney to investigate further.”” *Andrus v. Texas*, 140 S. Ct. 1875, 1883 (2020)  
 21 (quoting *Wiggins*, 539 U.S. at 527). The trial court record also contained numerous  
 22 red flags reinforcing the plausibility of his cognitive impairments. *See* Section V.A,  
 23 *supra*. Competent counsel is expected to undertake a “thorough investigation of law  
 24 and facts relevant to *plausible* options . . .” *Strickland*, 466 U.S. at 690 (emphasis  
 25 added). Yet Antieau did nothing.

26       Thus, this was not a case where that “reasonable professional judgments  
 27 support[ed] limitations on investigation.” *Id.* at 691; *see Andrus*, 140 S. Ct. at 1883.

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28 in an evidentiary hearing during post-conviction proceedings.

1 Antieau himself confirmed with the court that the scope of the resentencing was not  
 2 limited to substance abuse and that he could have included whatever evidence he  
 3 wanted to present. (Tr. 10/24/1994 at 32–33.) Yet, despite that admission, he limited  
 4 his investigation into Gallegos’s mental state to intoxication at the time of the  
 5 offense. He defaulted on a basic duty to investigate potential brain impairments and  
 6 consequent serious deficits in Gallegos’s cognitive functioning. His performance  
 7 was constitutionally deficient. *Caro*, 280 F.3d at 1255; *Hendricks*, 70 F.3d at 1043;  
 8 *Bemore v. Chappell*, 788 F.3d 1151, 1171, 1174 (9th Cir. 2015), *cert. denied*, 136  
 9 S. Ct. 1173 (2016); *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005).

10       Respondents contends:

11       No. John Antieau performed a diligent mitigation investigation and presented  
 12 a reasonable resentencing under prevailing professional norms. He accepted  
 13 assistance from the Arizona Capital Representation Project, and had at his disposal  
 14 interviews from everyone who knew Petitioner before the offense, documentation  
 15 of his learning disabilities and special education, his performance on juvenile  
 16 probation, and Petitioner’s lengthy history of serious substance abuse. Even if this  
 17 Court accepts as true that ATV accidents resulted in a head injury to the Petitioner,  
 18 it is impossible to determine what role that played coupled with his excessive drug  
 19 and alcohol use.

20       *Strickland* holds that “[j]udicial scrutiny of counsel’s performance must be  
 21 highly deferential, and a fair assessment of attorney performance requires that *every*  
 22 *effort be made to eliminate the distorting effects of hindsight, to reconstruct the*  
 23 *circumstances of counsel’s challenged conduct, and to evaluate the conduct from*  
 24 *counsel’s perspective at the time.*” 466 U.S. at 669 (emphasis added). In this case,  
 25 the Court will see a claim that is molded entirely out of hindsight. Subsequent  
 26 interviews with witnesses and their declarations reveal increased emphasis on the  
 27 ATV accidents that were of seemingly little significance to them during the time  
 28 leading up to Petitioner’s trial and resentencing. This Court will also hear evidence

1 that the tests, technology, and theories surrounding adolescent organic brain  
 2 damage that exist today, were not widely accepted in the scientific community when  
 3 John Antieau was handling Petitioner's case. Therefore, counsel was not  
 4 ineffective.

5           **D. Did the deficient performance of resentencing counsel undermine  
 6 confidence in the outcome of the resentencing proceeding and  
 7 therefore prejudice under *Strickland*?**

8           Petitioner contends: Yes. In order to establish prejudice, Petitioner must  
 9 show "that there is a reasonable probability that, but for counsel's unprofessional  
 10 errors, the result of the proceeding would have been different." *Strickland*, 466 U.S.  
 11 at 694. When a Petitioner challenges a death sentence, the question is whether there  
 12 is a reasonable probability that, absent the errors, the sentencer would have  
 13 concluded that the balance of aggravating and mitigating circumstances did not  
 14 warrant death. *Id.* at 695. When making this determination, this Court must consider  
 15 the totality of the mitigating evidence; i.e., the evidence introduced at the original  
 16 sentencing and the new mitigation evidence. *Williams*, 529 U.S. at 397–98 (2000).  
 17 "[T]he district court's role [is] not to evaluate the evidence in order to reach a  
 18 conclusive opinion as to [] brain injury (or lack thereof);" instead, this Court should  
 19 assess "only whether there existed a 'reasonable probability' that 'an objective fact-  
 20 finder' in a state sentencing hearing would have concluded, based on the evidence  
 21 presented, that" a life sentence was appropriate. *Correll v. Ryan*, 539 F.3d 938, 952  
 22 n.6 (9th Cir. 2008) (third alteration in original) (quoting *Summerlin*, 427 F.3d at  
 23 643).

24           The Supreme Court has never limited *Strickland*'s prejudice inquiry "to cases  
 25 in which there was only 'little or no mitigation evidence presented.'" *Sears v.  
 26 Upton*, 561 U.S. 945, 954–55 (2010) (per curiam) ("We certainly have never held  
 27 that counsel's effort to present *some* mitigation evidence should foreclose an  
 28 inquiry into whether a facially deficient mitigation investigation might have

1 prejudiced the defendant.”). To the contrary, prejudice will be found when a “more  
 2 complete presentation . . . could have made a difference.” *Stankewitz v. Woodford*,  
 3 365 F.3d 706, 724 (9th Cir. 2004) (“We have held, however, that a defendant was  
 4 prejudiced when, ‘[a]lthough [counsel] introduced some of [the defendant’s] social  
 5 history, he did so in a cursory manner that was not particularly useful or  
 6 compelling.’” (alterations in original) (quoting *Douglas v. Woodford*, 316 F.3d  
 7 1079, 1090 (9th Cir. 2003))); *Bemore*, 788 F.3d at 1172. (“[I]t is not enough just to  
 8 present ‘extensive mitigating evidence’ where particularly persuasive evidence—  
 9 especially evidence in the form of expert [mental health] testimony—was  
 10 omitted.”); *Jones v. Ryan*, 583 F.3d 626, 641–43 (9th Cir. 2009), *judgment vacated*  
 11 *on other grounds*, 563 U.S. 932 (2011) (“We have consistently held that merely  
 12 skimming the surface on important issues does not make in-depth discussion  
 13 cumulative.”).

14 Gallegos’s case is an unusual one because in so many words, in *Gallegos I*,  
 15 the Arizona Supreme Court explicitly recognized that a life sentence was  
 16 reasonably plausible. It refused to affirm Gallegos’s death sentence because it was  
 17 unable to “ascertain whether the trial judge would have sentenced defendant to  
 18 death had he considered defendant’s impairment[,]” including his learning  
 19 disability and long history of substance abuse. *Gallegos I*, 870 P2d at 1114–15; *see also id.*, at 1118. Thus, from the very beginning, Gallegos’s case was emblematic  
 20 of one where a “complete presentation . . . could have made a difference.”  
 21 *Stankewitz*, 365 F.3d at 724. It is therefore unsurprising that the Arizona Supreme  
 22 Court took the unusual step of remanding Gallegos’s case for a resentencing, where  
 23 this Court previously noted, “the trial court [could] assess [Petitioner’s]  
 24 impairment . . .” (ECF No. 160 at 6.)

25 Yet on remand, even though the trial court allowed Gallegos to “present any  
 26 mitigation evidence that he desired[,]” *Gallegos II*, 916 P.2d at 1059, a  
 27 constitutionally flawed investigation—already described above—left the record  
 28

1 barren of readily available evidence that Gallegos suffered moderate to severe brain  
 2 impairments, that by their very nature would have made a difference to the outcome.  
 3 Some lay witnesses did testify about Petitioner’s learning disabilities and substance  
 4 abuse, but the evidence did not even scratch the surface in terms of accurately  
 5 portraying Gallegos’s serious cognitive impairments. And no testimony was offered  
 6 from school teachers, who could have shed real light on the serious extent of  
 7 Gallegos’s disabilities on his cognitive functioning and behavior. (*See* ECF No.  
 8 211-2; ECF No. 211-3.)<sup>5</sup> This presented evidence came nowhere near close to  
 9 accurately presenting the scope of Gallegos’s impairments to the sentencing judge.  
 10 *Cf. Correll*, 539 F.3d at 953 n.8 (“While the bare facts of Correll’s troubled past  
 11 were indeed presented to the court, without further investigation and presentation  
 12 of contextual evidence and argument, such facts served only to demonize Correll  
 13 rather than to mitigate the appropriateness of imposing the death penalty for his  
 14 actions.”).

15 Instead, resentencing counsel offered only one expert report, from substance-  
 16 abuse expert Dr. Charles Shaw, who was not called to testify. (Tr. 10/24/1994 at  
 17 142.) Dr. Shaw’s report was focused on advancing the theory that Gallegos was  
 18 significantly intoxicated at the time of the offense. (ECF No. 152-7 at 35–36.) The  
 19 evidence was determined to be unpersuasive. *Gallegos II*, 916 P.2d at 1060–61.  
 20 Counsel’s ineffectiveness had deadly consequences. Relying on  
 21 Dr. John DiBacco’s report submitted at the first sentencing, the resentencing court  
 22 found—opposite to the evidence that counsel *should* have presented—that Gallegos  
 23 suffered from no mental deficiencies. (Tr. 10/24/1994 at 185; *see also*  
 24 ECF No. 152-7 at 27–33.) Of course, Dr. DiBacco had not been tasked with  
 25 investigating brain impairment, nor did he do so, and in the end the resentencing

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26  
 27 <sup>5</sup> See American Bar Association Guidelines for the Appointment and Performance  
 28 of Defense Counsel in Death Penalty Cases at §§ 11.4.1(2)(C); 11.8 (B)(2)  
 (emphasizing mitigation relevant to cognitive limitations and related behaviors, as  
 may be revealed in educational history, should be investigated and presented.

1 court was left with an unreliable and inaccurate portrayal of Gallegos's deficits and  
 2 limitations.

3       The investigation conducted by Antieau stands in stark contrast to the  
 4 investigation that reasonable counsel would have conducted. First, as explained  
 5 above, he would have met with Gallegos to discuss his head injuries; Gallegos  
 6 would have told the attorney that he suffered a number of head injuries and that, on  
 7 multiple occasions, these injuries caused him to lose consciousness. (ECF No. 152-  
 8 6 at 26; ECF No. 153-1 at 136–37.) A reasonable attorney would then have spoken  
 9 to his family members and friends, whose names AZCAP provided to Antieau, to  
 10 develop this information. (ECF No. 152-8 at 35; ECF No. 152-8 at 41; ECF No.  
 11 152-8 at 50; ECF No. 152-8 at 66.) Four witnesses, Michelle Emig (Gallegos's  
 12 niece), Todd Emig (his niece's husband), Tony Duran (Gallegos's friend), and  
 13 Hortensia Gallegos (Gallegos's mother) would have corroborated Gallegos's  
 14 statements and explained his symptoms after the head injuries. (ECF No. 153-1 at  
 15 85; ECF No. 153-1 at 93; ECF No. 152-8 at 35; ECF No. 152-8 at 66.) Additional  
 16 discussions with Gallegos's family members and friends would have led to Antieau  
 17 confirming that, in another accident in which Gallegos struck a tree while riding an  
 18 ATC, his helmet broke into pieces. (ECF No. 153-1 at 85; ECF No. 153-1 at 114.)

19       Antieau knew about Gallegos's substance abuse as a teenager, but a  
 20 reasonable attorney would have discussed this with Gallegos himself. Gallegos  
 21 would have explained, among other things, that his paternal grandfather was an  
 22 alcoholic and died from liver problems. (ECF No. 152-8 at 13.) A reasonable  
 23 attorney would have provided this information to an expert in child psychiatry, like  
 24 Dr. Fassler, because research in 1994 indicated that the adolescent brain was still  
 25 developing at 12 years old, when Gallegos started using alcohol. (ECF No. 152-6  
 26 at 75.) Additionally, that expert would have explained that Gallegos likely had a  
 27 genetic predisposition to alcohol abuse due to his paternal grandfather being an  
 28 alcoholic. (ECF No. 152-6 at 67.) The expert would have further opined that alcohol

1 and substance abuse may impair adolescent brain development. (ECF No. 152-6 at  
2 65–66, 75.)

3 A reasonable attorney would have also investigated the effects of Gallegos's  
4 learning disability diagnosis. AZCAP gathered some school records in 1994 and  
5 provided the names of Gallegos's schools to Antieu. (ECF No. 152-8 at 58.) If  
6 Antieu had obtained all of Gallegos's school records, he would have learned that,  
7 in 1985, Gallegos had disorders in "psychological processes" including those  
8 affecting visual-motor integration, sequencing, and auditory memory. (ECF No.  
9 153 at 64.) His school records further state that, in his final year of high school,  
10 Gallegos was totally "self-contained." (ECF No. 152-10 at 123.) A reasonable  
11 investigation would have led to Russell Randall, Gallegos's special education  
12 teacher in his senior year of high school. AZCAP supplied Antieu with his name  
13 and the name of the school where he worked. (ECF No. 152-8 at 44; ECF No. 152-  
14 8 at 57; ECF No. 152-8 at 59.) Randall would have told Antieu that Gallegos was  
15 in self-contained classrooms because "he was not cognitively or socially equipped  
16 to be in general education classes." (ECF No. 211-3 at 3.) Randall would have  
17 added that Gallegos "was lower functioning than many of his learning-disabled  
18 peers in [his] special education classes." (ECF No. 211-3 at 3.) According to  
19 Randall, Gallegos's learning disability caused his age to not be representative of his  
20 actual maturity level. (ECF No. 211-3 at 3.) Gallegos's disability made him more  
21 like a 13-year-old in a 17- or 18-year-old's body. (ECF No. 211-3 at 3.)

22 Sally Ake, another of Gallegos's special education teachers in high school,  
23 would have corroborated Randall's assessment. (ECF No. 211-2 at 4.) Antieu had  
24 her name and address. (ECF No. 152-8 at 59.) By speaking to Ake, Antieu would  
25 have also learned that Gallegos suffered "auditory and visual processing disabilities  
26 throughout his academic career." (ECF No. 211-2 at 3.) Gallegos was at a loss in  
27 making appropriate decisions, had difficulty controlling his impulses, had difficulty  
28 understanding and processing information, and was easily manipulated by others.

1 (ECF No. 211-2 at 3.) Ake would have explained that his disabilities impeded his  
2 ability to acquire the social skills needed to interrelate with children inside and  
3 outside the special education program. (ECF No. 211-2 at 2.) Armed with the  
4 evidence from Gallegos's educational records, a reasonable attorney would have  
5 retained an expert in learning disabilities and special education, like Dr. Nancy  
6 Cowardin or Dr. Daniel Reschly, to further investigate the disabling effects of  
7 Gallegos's visual and auditory processing disorders, and how those disabilities  
8 undermined his adolescent development and maturity. *See Rompilla v. Beard*, 545  
9 U.S. 374, 391 (2005) (if trial counsel had conducted a reasonable investigation, and  
10 obtained new evidence, they would "unquestionably have gone further to build a  
11 mitigation case[]"); *Washington v. Ryan*, 922 F.3d 419, 429–30 (9th Cir. 2019)  
12 (counsel's unreasonable failure to investigate education and other records in the  
13 first instance prevented counsel from gaining information that would have led him  
14 to request further psychological evaluation) (citing *Rompilla*, 545 U.S. at 390–93).

15 Educational experts would have explained that a learning disorder is a brain-  
16 based, neurodevelopmental disorder and Gallegos's neurodevelopmental disorder  
17 result in significant deficits and abnormalities in brain function, with associated  
18 deficits in social, emotional, and adaptive functioning. (ECF No. 209-1 at 5, 8, 22.)  
19 In addition, a learning disability affects a person beyond the classroom. (ECF No.  
20 152-6 at 155.) A person with an accompanying psychological deficit in auditory  
21 processing has difficulty in understanding information to modulate his behavior.  
22 (ECF No. 209-1 at 20; ECF No. 152-6 at 155.) The behavioral ramifications of these  
23 disorders extends to domestic life and social interactions. (ECF No. 152-6 at 155.)  
24 Further, such an expert would have explained that people with neurodevelopmental  
25 disorders, like Gallegos, suffer delays in development of executive functioning,  
26 meaning they are less capable of controlling impulsive behavior, anticipating  
27 consequences, and avoiding dangerous situations. (ECF No. 209-1 at 21.) And  
28 children and adolescents with neurodevelopmental disorders, as Gallegos did,

1 suffer delays in adult development and maturity. (ECF No. 209-1 at 31.) Thus,  
 2 Gallegos functioned at a much younger age than his chronological age of eighteen  
 3 at the time of the offense in 1989. In turn, this evidence would have supported the  
 4 statutory mitigation factor respecting the defendant's maturity and age; a factor the  
 5 Arizona Supreme Court gave little weight due to the absence of supporting  
 6 evidence. *Gallegos II*, 916 P.2d at 1062.

7 After communicating with his client and following the leads in his file,  
 8 Antieau would have had evidence that (1) Gallegos's learning disability was a  
 9 brain-based disorder that caused significant cognitive deficits and affected his  
 10 behavior, (2) his substance abuse as an adolescent may have impaired his brain  
 11 development, and (3) multiple accidents with head injuries possibly resulted in  
 12 further impairments to his already impaired brain. Therefore, in light of all these  
 13 discoveries, “the known evidence would [have] led a reasonable attorney to  
 14 investigate further.” *Andrus*, 140 S. Ct. at 1883 (quoting *Wiggins*, 539 U.S. at 527).  
 15 Habeas counsel did so, by retaining neuropsychologist Dr. Robert Heilbronner, to  
 16 conduct testing to further assess the extent of Gallegos's brain impairments. Testing  
 17 would have demonstrated “*objective evidence of cognitive dysfunction reflecting  
 18 brain-based disturbances in functioning.*” (ECF No. 152-6 at 29.) The  
 19 neuropsychologist, would have further determined that Gallegos's lifelong history  
 20 of cognitive impairments, first evidenced in pronounced learning disabilities, and  
 21 later compounded by head injuries, impaired his capacity to conform his conduct to  
 22 the requirements of law and that he was significantly impaired at the time of the  
 23 offense. (ECF No. 152-6 at 23-29; ECF No. 152-6 at 31-35.)

24 Without the above investigation, the resentencing judge had been misled  
 25 about nearly every facet of Gallegos's impairments. A thorough investigation  
 26 would have shown that Gallegos exhibited symptoms of brain damage and  
 27 cognitive dysfunction beginning in early childhood. These brain-based disabilities  
 28 had wide-ranging adverse effects on his emotional and psychosocial development,

1 ultimately contributing to self-medication with drugs and alcohol, engagement in  
 2 risky behaviors resulting in multiple head injuries that caused further damage to his  
 3 brain, and further reduced his capacity to regulate his behavior at the time of the  
 4 offense. Gallegos was also functioning as a child younger than his chronological  
 5 age when he was susceptible to the influence of the co-defendant and a combination  
 6 of alcohol and drugs.

7       The failure to produce this evidence prejudiced Gallegos. It would have  
 8 demonstrated that he was significantly impaired in his capacity to conform his  
 9 conduct to the law at the time of the offense, thereby satisfying the statutory  
 10 mitigator in Arizona Revised Statutes (“A.R.S.”) § 13-703(G)(1) (1988) (current  
 11 version at A.R.S. § 13-751(G)(1) (2019)). And, as the Arizona Supreme Court  
 12 recognized, these types of impairments can also serve as powerful non-statutory  
 13 mitigation. *See Gallegos I*, 870 P.2d at 1114.

14       Indeed, courts have long recognized that evidence of organic brain damage  
 15 is particularly compelling in mitigation as it offers an explanation for a defendant’s  
 16 behavior at the time of the offense and reduces moral culpability. *See, e.g., Abdul-*  
*Kabir v. Quarterman*, 550 U.S. 233, 241 (2007) (“In sum, the strength of Cole’s  
 17 mitigating evidence . . . was its tendency to prove that his violent propensities were  
 18 caused by factors beyond his control—namely, neurological damage and childhood  
 19 neglect and abandonment.”); *Caro*, 280 F.3d at 1258 (“The jury was not afforded  
 20 the benefit of expert testimony explaining the effects that Caro’s *physiological*  
 21 defects would have on his behavior, such as causing him to have ‘impulse  
 22 discontrol’ and irrational aggressiveness. By explaining that his behavior was  
 23 physically compelled, not premeditated, or even due to a lack of emotional control,  
 24 his moral culpability would have been reduced.”); *Littlejohn v. Trammell*, 704 F.3d  
 25 817, 864 (10th Cir. 2013) (“Evidence of organic mental deficits ranks among the  
 26 most powerful types of mitigation evidence available.”); *Hooks v. Workman*, 689  
 27 F.3d 1148, 1205 (10th Cir. 2012) (“Evidence of organic brain damage is something  
 28

1 that we and other courts, including the Supreme Court, have found to have a  
 2 powerful mitigating effect. . . . And for good reason—the involuntary physical  
 3 alteration of brain structures, with its attendant effects on behavior, tends to  
 4 diminish moral culpability, altering the causal relationship between impulse and  
 5 action.”). This evidence is particularly probative not only because it provides  
 6 standalone weight as mitigation, but also because it rebuts the prosecution’s  
 7 showing of aggravation. *See, Summerlin*, 427 F.3d at 641–42 (“The strong  
 8 psychiatric evidence of Summerlin’s lack of impulse and emotional control and  
 9 organic brain dysfunction could have provided significant mitigating evidence  
 10 countering the State’s circumstantial evidence that the crime was committed in an  
 11 especially heinous manner.”).

12 Nor does it make any difference that resentencing counsel “skimmed the  
 13 surface” of Petitioner’s learning disabilities or drinking problems. *Jones*, 583 F.3d  
 14 at 641–43 (collecting cases). Minimal evidence of impairment does not render the  
 15 newfound expert evidence of Petitioner’s brain impairments redundant or  
 16 cumulative. Instead, prejudice must still be found because a “more complete  
 17 presentation . . . could have made a difference.” *Stankewitz*, 365 F.3d at 724 (“We  
 18 have held, however, that a defendant was prejudiced when, ‘[a]lthough [counsel]  
 19 introduced some of [the defendant’s] social history, he did so in a cursory manner  
 20 that was not particularly useful or compelling.’” *Id.* (alteration in original) (quoting  
 21 *Douglas*, 316 F.3d at 1090); *see also Bean v. Calderon*, 163 F.3d 1073, 1081  
 22 (9th Cir. 1998) (finding prejudice when “numerous” mitigating factors “were  
 23 reported to the jury” but “only in the vaguest of terms.”).

24 The omission of expert testimony about cognitive or brain impairment is  
 25 particularly prejudicial. “[I]t is not enough just to present ‘extensive mitigating  
 26 evidence’ where particularly persuasive evidence—especially evidence in the form  
 27 of expert testimony—was omitted.” *Bemore*, 788 F.3d at 1172. And it also is “not  
 28 enough that some of the defense witnesses informed the jury of the facts that

1 might *underlie* a mental health mitigation defense; ‘expert testimony to explain the  
 2 ramifications of those experiences on [petitioner’s] behavior . . . is necessary.’” *Id.*  
 3 (quoting *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999)). Thus, even if trial  
 4 counsel offered some expert evidence on mental impairment, prejudice must still  
 5 be found when the “only expert testimony presented relating to [] mental health did  
 6 not shed light on his brain damage.” *Caro*, 280 F.3d at 1257 (finding prejudice even  
 7 though sentencing counsel presented expert testimony from a psychologist and  
 8 social worker); *see also, e.g.*, *Bemore*, 788 F.3d at 1172 (finding prejudice even  
 9 though clinical psychologist “testified [] about the impact on Bemore of growing  
 10 up in a family with chemical dependency[]” and other “witnesses did mention  
 11 Bemore’s drug problems and tumultuous upbringing.”); *Littlejohn*, 704 F.3d at 862  
 12 (“In this case, while counsel presented *some* mitigation evidence—relating to  
 13 Mr. Littlejohn’s socioeconomic and psychological development—there were  
 14 numerous indicators suggesting that a *neurological* evaluation could have  
 15 uncovered evidence of organic brain damage.”).

16 It is unsurprising that the Arizona Supreme Court ultimately affirmed  
 17 Gallegos’s sentence without testimony from experts like Drs. Reschly, Heilbronner,  
 18 or Fassler. But these experts filled nearly all of the gaps the Arizona Supreme Court  
 19 highlighted when finding resentencing counsel’s presentation unpersuasive.

20 For example, that court discounted Gallegos’s problems with substance  
 21 abuse because of his “failure to seek treatment.” *Gallegos II*, 916 P.2d at 1061. We  
 22 now know that both genetic and environmental circumstances beyond his control  
 23 predisposed Gallegos to substance abuse, explaining this failure. (ECF No. 152-6  
 24 at 67, 74.) *See Jones*, 583 F.3d at 643 (“It is much easier to discount the effects of  
 25 substance abuse when the facts which led to the abuse are unknown, but much less  
 26 so when we gain insight into the particular circumstances an individual was facing  
 27 when he began abusing drugs.”) The Arizona Supreme Court also discounted the  
 28 mitigating weight of Gallegos’s age, citing his apparent maturity and an expert

1 report finding Gallegos to be of “at least average fluid intelligence” and “not  
 2 mentally deficient.” *Gallegos II*, 916 P.2d at 1062. We now know that Gallegos is  
 3 of below average intelligence, and suffers from neurological developmental  
 4 deficiencies that rendered his brain development and maturity level far below age  
 5 appropriate. (ECF No. 152-6 at 27; ECF No. 209-1 at 16, 19, 32.) The Arizona  
 6 Supreme Court also found that Gallegos’s conduct “reveal[ed] decisiveness and  
 7 intent[,]” *Gallegos II*, 916 P.2d at 1063, but we now know that he may not have had  
 8 the capacity to form such an intent, and was particularly susceptible to the influence  
 9 of others. (ECF No. 152-6 at 28–29; ECF No. 152-6 at 32; ECF 209-1 at 34.)  
 10 Moreover, the Arizona Supreme Court’s reliance on the “heinous or depraved”  
 11 aggravator, *Gallegos II*, 916 P.2d at 1063, would have been undermined by expert  
 12 testimony of Gallegos’s organic brain damage. *See Summerlin*, 427 F.3d at 641–42  
 13 (finding evidence of “organic brain dysfunction could have . . . counter[ed] the  
 14 State’s circumstantial evidence that the crime was committed in an especially  
 15 heinous manner.”).

16 Finally, the failure to add this information to the record prevented the Arizona  
 17 Supreme Court from considering the full scope of his brain impairments on  
 18 independent review. *See Correll*, 539 F.3d at 951 (“[T]here is no strategic excuse  
 19 for failing to put on evidence in support of statutory mitigating factors that the  
 20 Arizona Supreme Court could have considered in its independent re-weighing of  
 21 aggravating and mitigating factors.”). The omitted expert evidence is just the sort  
 22 that the Arizona Supreme Court was relying on to impose life sentences on  
 23 independent review in the years before Gallegos’s resentencing. *See, e.g., State v.*  
 24 *Stuard*, 863 P.2d 881, 902 (Ariz. 1993) (sentence reduced to life based on expert  
 25 evidence of severe organic brain damage, dementia, and low IQ); *State v. Jimenez*,  
 26 799 P.2d 785, 800 (Ariz. 1990) (sentence reduced to life based on expert evidence  
 27 of major mental illness); *State v. Rockwell*, 775 P.2d 1069, 1079–80 (Ariz. 1989)  
 28 (sentence reduced to life based on defendant’s age, and impact of motorcycle

1 accident on his behavior and substance abuse); *State v. Mauro*, 766 P.2d 59, 81  
 2 (Ariz. 1988) (sentence reduced to life based on expert evidence of “chemical  
 3 disorder in the brain”); *State v. Stevens*, 764 P.2d 724, 728–29 (Ariz. 1988)  
 4 (sentence reduced to life based on expert testimony about diminished capacity  
 5 caused by substance abuse); *State v. Graham*, 660 P.2d 460, 463–64 (Ariz. 1983)  
 6 (sentence reduced to life based on expert evidence that defendant was immature for  
 7 his age; suffered from drug addiction “not . . . of his own making”; and from  
 8 neurological problems and brain damage); *State v. Brookover*, 601 P.2d 1322,  
 9 1325–26 (Ariz. 1979) (sentence reduced to life based on expert evidence that  
 10 defendant suffered from brain damage inhibiting development).

11 This Court must additionally consider this new evidence of brain damage and  
 12 impairment mitigating evidence along with the rest of the mitigating evidence that  
 13 was presented at the resentencing. *Williams*, 529 U.S. at 397–98. The crime  
 14 occurred four months after Gallegos’s eighteenth birthday. By that point, Gallegos  
 15 was an alcoholic; he had started drinking at 12 or 13 years old. (Tr. 10/24/1994 at  
 16 184.) Additionally, George Smallwood brought up the idea to fondle the victim.  
 17 (Tr. 10/24/1994 at 25–26.) According to multiple witnesses, Gallegos tended to  
 18 follow Smallwood’s lead. (Tr. 10/24/1994 at 58, 67, 89, 98.)<sup>6</sup> Gallegos did not enter  
 19 the victim’s room with the intent to kill her. (ECF No. 152-3 at 46.) Detective  
 20 Chambers indicated that the crime was accidental. (Tr. 10/24/1994 at 45.) Since the  
 21 crime, Gallegos has repeatedly expressed his remorse. (Tr. 5/24/1991 at 42–43; Tr.  
 22 10/24/1994 at 175–76.) In addition, two Phoenix police detectives recommended  
 23 that he receive a life sentence. (Tr. 10/24/1994 at 33, 41.)

24 As this Court has already recognized, the “totality of the weight in  
 25 mitigation . . . would have been substantially greater with evidence that Gallegos  
 26 suffered from brain damage, . . . and the resentencing court would have been

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27       <sup>6</sup> Although the prosecution dismissed charges against Smallwood, a Phoenix police  
 28 detective believed that Smallwood was also responsible for the victim’s death.  
 (Tr. 10/24/1991 at 41.)

1 presented with a stronger and more sympathetic mitigation profile. . . . Because  
 2 evidence of organic brain damage is particularly compelling, counsel's failure to  
 3 produce such evidence in mitigation results in a greater likelihood of prejudice."  
 4 (ECF No. 160 at 17 (citations and quotation marks omitted).) The failure by  
 5 Gallegos's resentencing counsel to present this evidence undermines the reliability  
 6 of the outcome of Gallegos's case. Had this evidence been presented, there is a  
 7 reasonable probability the outcome would have been different.

8 Respondents contends:

9 No. Petitioner offers speculative and tenuous theories about brain damage  
 10 without credible, objective evidence to support this claim. When balanced against  
 11 the aggravating circumstances, Petitioner cannot establish a reasonable probability  
 12 that Judge Hotham would have returned a life sentence if counsel had presented all  
 13 of the mitigation evidence now available to Petitioner after more than a decade of  
 14 available research. *See Strickland*, 466 U.S. at 694. Petitioner offers speculative and  
 15 tenuous theories about brain damage, but these circumstances are not conclusive,  
 16 and do not overcome Petitioner's burden to establish a reasonable probability that  
 17 the sentencing judge would have returned a life sentence.

18 **VI. LIST OF WITNESSES**

19 Each party understands that it is responsible for ensuring that the witnesses  
 20 it wishes to call to testify are subpoenaed. Each party further understands that any  
 21 witness a party wishes to call shall be listed on that party's list of witnesses; the  
 22 party cannot rely on the witness having been listed or subpoenaed by another party.

23 Petitioner's Witnesses:

24 1. Ms. Sally Ake

25 Sally Ake was one of Mr. Gallegos's special education teachers  
 26 in high school. She did not testify during the state court proceedings.  
 27 During federal habeas proceedings, Ms. Ake signed a declaration in  
 28 2002, which is part of the record (ECF. No. 153-1 at 69; ECF No. 160

1 at 18). The 2002 declaration, however, contains little information  
 2 about Mr. Gallegos's academic struggles due to his learning disability.  
 3 In contrast, her 2020 declaration catalogs how Mr. Gallegos's learning  
 4 disability affected his social, emotional, and adaptive functioning, as  
 5 well as his immaturity, which left him functioning well below his age.  
 6 She has firsthand knowledge of Mr. Gallegos's serious deficits in  
 7 psychological processing including deficits in visual and auditory  
 8 processing and sequencing; serious disabilities, which impaired his  
 9 functioning inside and outside the classroom. Further, Ms. Ake's  
 10 testimony contextualizes her experiences with him within her more  
 11 than twenty-years of experience as a special education teacher.  
 12 Petitioner's expert, Dr. Daniel Reschly, is relying on Ms. Ake's first-  
 13 hand observations in support of his finding that Mr. Gallegos's  
 14 learning disability is an expression of an underlying brain-based  
 15 neurodevelopmental disorder. Because Respondents are contesting  
 16 Ms. Ake's declaration, if the Court elects not to admit her declaration,  
 17 it is imperative she be permitted to testify.

18 2. Mr. Anthony Duran<sup>7</sup>

19 Tony Duran was Mr. Gallegos's friend from elementary to high  
 20 school. Mr. Duran testified at the 1994 resentencing hearing and  
 21 signed a declaration in 2017, which is part of the record (ECF No. 153-  
 22 1 at 85; ECF No. 160 at 18). Mr. Duran has knowledge material to  
 23 several different issues. First, he can testify regarding his observations  
 24 of Mr. Gallegos's learning disability and the effects it had on his

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25 <sup>7</sup> Petitioner has added an asterisk to indicate that Petitioner is willing to proceed  
 26 without the witness's live testimony, provided the Court is willing to consider their  
 27 2017 declaration in evaluating the merits of Gallegos's claim. The relevant portions  
 28 of their proffered testimony is contained in their prior declarations or prior  
 testimony or other information in the record. This is in accordance with the Court's  
 prior order regarding live testimony. (See ECF No. 173 at 3.)

1 behavior outside the classroom. Second, with regard to the effects of  
2 Mr. Gallegos's head injuries, Mr. Duran can testify as to Mr.  
3 Gallegos's demeanor, appearance, and behavior after his ATV/ATC  
4 accidents. Third, Mr. Duran can testify regarding his disappointing  
5 encounters with the inattentive resentencing counsel, Mr. Antieau,  
6 before and during the resentencing proceeding, supporting the claim  
7 of ineffective assistance. These areas of testimony were neither  
8 provided in his 1994 testimony nor in his 2017 declaration. Because  
9 Respondents are contesting Mr. Duran's declaration, if the Court elects  
10 not to admit his declaration, it is imperative he be permitted to testify.

11 3. Ms. Mary Durand\*

12 Mary Durand was the mitigation specialist for both the 1991  
13 sentencing hearing and the 1994 resentencing hearing. She did not  
14 testify during state court proceedings. Ms. Durand was in possession  
15 of critical information, substantiating that claim that resentencing  
16 counsel, Mr. Antieau, had evidence that Mr. Gallegos likely suffered  
17 from cognitive deficits and possible brain damage, and that he failed  
18 to investigate this evidence. In 2017, she signed a declaration affirming  
19 this evidence, which is part of the record (ECF No. 153-1 at 89). Her  
20 2020 declaration elaborates on the declaration she submitted in 2017,  
21 adding that on multiple occasions she encouraged Mr. Antieau to  
22 investigate Mr. Gallegos's cognitive impairments, but he never did so.  
23 Her testimony at the evidentiary hearing will recount the same  
24 evidence presented in the 2017/2020 declarations. Respondents  
25 challenge the admission of her 2020 declaration.

26 Petitioner is willing to proceed without live testimony from Ms.  
27 Durand if the Court will consider the contents of her 2017 declaration,  
28 which is already part of the record, in evaluating the merits of

Petitioner's claim. (ECF No. 153-1 at 85; ECF No. 160 at 8) Because Respondents are contesting Ms. Durand's declaration, if the Court elects not to admit her 2020 or 2017 declarations, it is imperative she be permitted to testify.

4. Ms. Michelle Emig\*

Michele Emig is Mr. Gallegos's niece, who is near in age to him and lived with him when he was growing up in Flagstaff. Ms. Emig testified at the 1994 resentencing and provided signed declarations in 2002 and 2017, which are part of the record (ECF No. 153-1 at 93; ECF No. 153-1 at 96). Among other testimony, she will testify that in at least one of the ATC/ATV accidents, Mr. Gallegos was not wearing a helmet and chipped his front tooth, testimony that has never been provided before. Respondents do not stipulate to the admission of Ms. Emig's 2020 declaration and contest the fact above.

Petitioner is willing to proceed without live testimony from Ms. Emig, if the Court will consider the contents of Emig's 2017 declaration in evaluating the merits of Petitioner's claim. (ECF No. 153-1 at 93; ECF No. 160 at 8.) Because Respondents are contesting Ms. Emig's declaration, if the Court elects not to admit her 2020 or 2017 declarations, it is imperative she be permitted to testify

5. Dr. David Fassler

Dr. Fassler is expected to testify consistent with the affidavit he authored on October 6, 2017. (ECF No. 152-6 at 63, Ex. 54.) Petitioner expects to elicit testimony that children, even those at age 18, like Mr. Gallegos was at the time of the offense, have not achieved adult development of their brain, particularly, the frontal lobes which control judgment, regulation of impulses, abstract thinking and moral reasoning. Even apart from other factors, discussed next below, Dr.

1 Fassler's testimony concerning the nature of the undeveloped teenage  
 2 brain would have offered the sentencer a reason to consider a less  
 3 severe punishment. Dr. Fassler will also explain how Mr. Gallegos's  
 4 pronounced neurocognitively-based learning disorder, his genetically  
 5 rooted abuse of alcohol and drugs, and traumatic brain injuries  
 6 undermined the functioning of his already fragile juvenile-like brain.

7 Dr. Fassler's testimony will further demonstrate the prejudice  
 8 resulting from resentencing counsel's systematic failure to investigate  
 9 and present evidence bearing on Mr. Gallegos's diminished cognitive  
 10 abilities, particularly those associated with an undeveloped 18-year-  
 11 old brain.

12 6. Ms. Hortensia Gallegos\*

13 Hortensia Gallegos is Mr. Gallegos's mother. Ms. Gallegos  
 14 testified at the 1991 sentencing and 1994 resentencing. In addition, she  
 15 provided signed declarations in 2002 and 2017, which are part of the  
 16 record (ECF No. 153-1 at 102; ECF No. 153-1 at 105). In her 2020  
 17 declaration, Ms. Gallegos supplies more information regarding the  
 18 effects of his learning disability outside the classroom. She also  
 19 explains how, compared to her other children, he was more immature  
 20 and had a pronounced difficulty in understanding verbal instructions.

21 Petitioner is willing to proceed without live testimony from Ms.  
 22 Gallegos if the Court will consider the contents of her 2017  
 23 declaration, which is already a part of the record, in evaluating the  
 24 merits of Petitioner's claim. (ECF No. 153-1 at 102; ECF No. 160 at  
 25 8.)

26 7. Mr. Jerry Gallegos, Jr.\*

27 Jerry Gallegos, Jr. is Mr. Gallegos's older brother. Jerry Jr.  
 28 testified at the 1991 sentencing and signed declarations in 2002 and

1                   2017, which are part of the record (ECF No. 153-1 at 113; ECF No.  
2                   153-1 at 117). His testimony at the hearing will recount additional  
3                   accidents and injuries that Mr. Gallegos suffered when he was a child,  
4                   injuries that left him “dazed.” Additionally, he will explain the effects  
5                   of Mr. Gallegos’s learning disability on his daily life, rendering him  
6                   unable to learn from mistakes. Jerry Jr.’s personal experience with Mr.  
7                   Gallegos makes him a critical witness.

8                   Petitioner is willing to proceed without live testimony from  
9                   Jerry Gallegos, Jr., if the Court will consider the contents of his 2017  
10                  declaration, which is already a part of the record, in evaluating the  
11                  merits of Petitioner’s claim. (ECF No. 153-1 at 113; ECF No. 160 at  
12                  8.)

13                  8. Ms. Margaret Gallegos\*

14                  Margaret Gallegos is Mr. Gallegos’s older sister. She testified  
15                  at both the 1991 sentencing and 1994 resentencing. She also provided  
16                  signed declarations in 2002 and 2017, which are part of the record  
17                  (ECF No. 153-1 at 128; ECF No. 153-1 at 131). Her testimony at the  
18                  hearing will further detail the effects of Mr. Gallegos’s learning  
19                  disability, explaining how he could not easily process information. She  
20                  will also provide significant details concerning his head injuries such  
21                  as the fact that he was not wearing a helmet when he was thrown from  
22                  an ATV.

23                  Petitioner is willing to proceed without live testimony from  
24                  Margaret Gallegos if the Court will consider the contents of her 2017  
25                  declaration in evaluating the merits of Petitioner’s claim.

26                  9. Dr. Robert Heilbronner

27                  Dr. Heilbronner is a licensed neuropsychologist who conducted  
28                  a complete neuropsychological evaluation of Mr. Gallegos and

1 prepared a report dated December 12, 2011, and an addendum report  
2 authored October 3, 2017. (ECF No. 152-6 at 23, 31, Exs. 51 & 52.)  
3 He is expected to testify consistent with his two earlier reports, that  
4 neuropsychological testing demonstrated that Mr. Gallegos suffers  
5 from significant impairments in cognitive functions. He will testify  
6 that as a result of Mr. Gallegos's lifelong history of cognitive  
7 impairments, first evidenced in pronounced neurocognitively based  
8 learning disabilities, and later compounded by traumatic brain injury,  
9 Mr. Gallegos's capacity to conform his conduct to the requirements of  
10 law was significantly impaired at the time of the offense, thereby  
11 satisfying the statutory mitigator in A.R.S. § 13-703(G)(1) (1988)  
12 (current version at A.R.S. § 13-751(G)(1) (2019)).

13 Respondents plan to have Dr. Corwin Boake, also a licensed  
14 neuropsychologist, testify at the evidentiary hearing. He contests Dr.  
15 Heilbronner's methodology, but he did not test Mr. Gallegos and has  
16 not produced contrary testing results.

17 Dr. Heilbronner's testimony is critical to demonstrate prejudice  
18 from resentencing counsel's failure to investigate and present evidence  
19 of Mr. Gallegos's brain-based disabilities and how those disabilities  
20 resulted in a diminished mental capacity at the time of the offense.  
21 Secondarily, Dr. Heilbronner needs to testify in order to defend his  
22 findings against Dr. Boake's criticism.

23 10. Ms. Melodee Nowatzki

24 Melodee Nowatzki was the mitigation investigator for the  
25 Arizona Capital Representation Project, which assisted Mr. Antieau in  
26 representing Mr. Gallegos. Ms. Nowatzki provided a signed  
27 declaration in 2017, which is part of the record (ECF No. 153-1 at  
28 147). While her 2017 declaration was focused on her reception of

1 evidence concerning Mr. Gallegos's head injuries, her testimony  
2 and/or recently signed 2020 declaration will explain how she also  
3 received evidence that he was in special education classes and that she  
4 gathered his school records. She will also testify that she provided all  
5 of this information to Mr. Antieau for the resentencing hearing

6 11. Dr. Daniel Reschly

7 Dr. Reschly will explain the lifelong and often disabling  
8 consequences of Mr. Gallegos's Specific Learning Disability  
9 ("SLD"); a brain-based neurodevelopmental disorder manifested in  
10 significant deficits in learning as well as associated deficits in social,  
11 emotional, and adaptive functioning. Mr. Gallegos's deficits were  
12 expressed in a diminished capacity to understand and process  
13 information, to communicate, to abstract from mistakes, learn from  
14 experience, engage in logical reasoning, to control impulses, and  
15 understand others. Despite evidence of his normal intelligence (a  
16 diagnostic element of most specific learning disabilities), Mr.  
17 Gallegos's neurodevelopmentally rooted SLD disorder substantially  
18 limited his ability to achieve both inside and outside the classroom.  
19 During his adolescence, Mr. Gallegos's disabilities also left him  
20 vulnerable to manipulation by others, it considerably undermined his  
21 maturation, and left him functioning at a level much younger than his  
22 chronological age. Mr. Gallegos's neurodevelopmental disabilities, as  
23 expressed in his SLD also contextualize Mr. Gallegos's abuse of  
24 alcohol and drugs. First, his SLD placed him at increased risk for  
25 developing addiction problems and difficulty overcoming those  
26 problems. Unfortunately, Mr. Gallegos's strong genetic risks for  
27 addiction and his older brother's role in furnishing him with alcohol  
28 and drugs, magnified the risk that he would develop addiction issues

1 and would face challenging obstacles in overcoming those problems.  
2 Dr. Reschly is expected to testify consistent with his report dated  
3 September 11, 2020.

4 Dr. Reschly's testimony will further demonstrate the prejudice  
5 resulting from resentencing counsel's systematic failure to investigate  
6 and present evidence bearing on Mr. Gallegos's brain function  
7 abnormalities and cognitive deficits. Although Mr. Gallegos's  
8 sentencer and the Arizona Supreme Court knew that he had been  
9 diagnosed with a learning disability, they did not know that his  
10 disability was rooted in a brain-based neurodevelopmental disorder,  
11 associated with life-long deficits and neurobehavioral consequences.  
12 Dr. Reschly's testimony is critical to demonstrate that Mr. Gallegos's  
13 brain abnormalities did not begin with later head trauma; he was born  
14 with significant permanent deficits, which significantly undermined  
15 his maturity, judgment and reasoning. These disabilities were additive  
16 to his already underdeveloped 18-year-old brain, described by Dr.  
17 Fassler.

18 12. Mr. Russell Randall

19 Russell Randall was Mr. Gallegos's special education teacher in  
20 twelfth grade. Mr. Randall did not testify during the state court  
21 proceedings. Mr. Randall signed a declaration in 2002, which is part  
22 of the record (ECF. No. 153-1 at 160). His 2002 declaration also has  
23 little information about the serious effects of his learning disability  
24 compared to his 2020 declaration. He will testify that Mr. Gallegos  
25 would act without thinking about consequences and that he had deficits  
26 in reflective reasoning. Mr. Randall has firsthand knowledge of Mr.  
27 Gallegos's learning and emotional disabilities and their effects on him.  
28 As his teacher in twelfth grade, Mr. Randall is also uniquely positioned

1 to testify about the emotional and psychological struggles that Mr.  
 2 Gallegos had near in time to the offense. Dr. Reschly is relying on Mr.  
 3 Randall's first-hand observations in support of his finding that Mr.  
 4 Gallegos's learning disability is an expression of an underlying brain-  
 5 based neurodevelopmental disorder. Thus, Mr. Randall's testimony is  
 6 highly relevant to the proceedings. Because Respondents are  
 7 contesting Mr. Randall's declaration, if the Court elects not to admit  
 8 his declaration, it is imperative he be permitted to testify.

9       13. Mr. Noah Stalvey\*

10     Noah Stalvey was Mr. Gallegos's juvenile probation officer. He  
 11 testified in 1991. His testimony at the evidentiary hearing will mirror  
 12 the testimony he provided in 1991 and he will state that, despite  
 13 discussing Mr. Gallegos's learning disability in a presentence report,  
 14 he was not contacted by Mr. Antieau. Further Mr. Stalvey will offer  
 15 testimony that he had special training and experience working with  
 16 juvenile sexual offenders, and that Mr. Gallegos did not present the  
 17 typical signs or symptoms of those offenders. This supports the  
 18 conclusion that Mr. Gallegos's participation in the instant sexual  
 19 offense was a consequence of cognitive deficits and not habitually  
 20 sexually aberrational behavior. Respondents will not stipulate to the  
 21 admission of his declaration and contest the facts missing from his  
 22 1991 testimony.

23     Respondents' Witnesses

24       1. Dr. Corwin Boake

25     Dr. Corwin Boake is a neuropsychologist who interviewed Petitioner  
 26 and evaluated the expert reports in this case. He is expected to testify  
 27 consistent with his report dated September 11, 2020.

28       2. Any witness listed in above under "Petitioner's Witnesses."

1           Respondent contends:

2           Petitioner includes a footnote that indicates he is willing to forgo certain  
 3 witnesses' live testimony because their declarations and statements in the record  
 4 are sufficient. Respondents believe that it is necessary to have live testimony  
 5 because these witnesses' statements (some giving multiple statements since 1991)  
 6 differ or are contradictory and it is necessary to conduct a complete cross-  
 7 examination. While experts may have considered previous statements these  
 8 witnesses made, they are not *admissible* under the Federal Rules of Evidence and  
 9 are considered hearsay.

10          Petitioner appears to adopt contradictory positions as to the testimony of their  
 11 witnesses. Respondents only noticed Petitioner's witnesses (above) in the event that  
 12 this Court grants Petitioner's Motion for Live Testimony, Petitioner elects not to  
 13 call them, and seeks to rely solely upon their declarations. Respondents do not  
 14 intend to elicit new factual information from these witnesses, but want to ensure  
 15 their appearance at the hearing. Respondents maintain that cross-examination of  
 16 these witnesses is crucial to this Court's fact finding.

17          Petitioner contends:

18          By listing “[a]ny witness listed in above under ‘Petitioner’s Witnesses’” in  
 19 the Respondents’ witnesses, Respondents have violated this Court’s order requiring  
 20 motions be filed for each witness that testifies at the evidentiary hearing. (ECF No.  
 21 173 at 4.) Respondents filed a motion for live testimony for only their expert  
 22 witness; their motion contains no mention of any other witness. (ECF No. 212.) In  
 23 accordance with this Court’s order, Petitioner listed each witness in his Motion for  
 24 Live Testimony and explained in detail the substance of each witness’s proposed  
 25 testimony. (ECF No. 211 at 2–8.) In contrast, Respondents have included a brief  
 26 paragraph containing a generic explanation as to why ten witnesses must testify in  
 27 person. Respondents’ inclusion of “[a]ny witness listed in above under ‘Petitioner’s  
 28 Witnesses’” constitutes a late Motion to Present Live Witness Testimony and

1 unfairly prejudices Petitioner because he does not know what role each of the  
2 witnesses plays in Respondents' position. Respondents, however, are on notice of  
3 how each of these witnesses fit into Petitioner's case and can prepare accordingly.

## 4 **VII. LIST OF EXHIBITS**

### 5 **Petitioner's Exhibits**

- 6 1. Greg Clark's Trial Counsel File
- 7 2. John Antieau's Appellate/Resentencing Counsel File
- 8 3. Mary Durand's Trial Investigation/Sentencing/Resentencing  
Mitigation File
- 9 4. Arizona Capital Representation Project's Investigation/Consultation  
File
- 10 5. Declaration of Sally Ake, 9/8/2020
- 11 6. Declaration of Aaron Barrett, 9/3/2020
- 12 7. Declaration of Anthony Duran, 9/4/2020
- 13 8. Declaration of Mary Durand, 9/4/2020
- 14 9. Declaration of Michelle Emig, 9/7/2020
- 15 10. Declaration of Hortensia Gallegos, 9/4/2020
- 16 11. Declaration of Jerry Gallegos, Jr., 9/5/2020
- 17 12. Declaration of Jerry Gallegos, Sr., 10/9/2002
- 18 13. Declaration of Margaret Gallegos, 9/5/2020
- 19 14. Declaration of Melodee Nowatzki, 9/3/2020
- 20 15. Declaration of Statia Peakheart, 9/4/2020
- 21 16. Declaration of Russell Randall, 9/3/2020
- 22 17. Declaration of Noah Stalvey, 9/4/2020
- 23 18. AZCAP faxes from Melodee Nowatzki to John Antieau
- 24 19. School Records of Michael Gallegos
- 25 20. Juvenile Records of Michael Gallegos (obtained by prior counsel)

26  
27  
28

## **Respondents' Exhibits**

- 24        58. Curriculum Vitae of Dr. Corwin Boake  
25        59. Report of psychological evaluation by Dr. Boake, dated 9/9/2020  
26        60. Interview Transcript of Dr. Robert Heilbronner  
27        61. Interview Transcript of Dr. Daniel Reschly  
28        62. Interview Transcript of Dr. David Fassler

- 1       63. Interview Transcript of Mr. Garrett Simpson
- 2       64. Interview Transcript of Sally Ake
- 3       65. Interview Transcript of Anthony Duran
- 4       66. Interview Transcript of Mary Durand
- 5       67. Interview Transcript of Michelle Emig
- 6       68. Interview Transcript of Hortensia Gallegos
- 7       69. Interview Transcript of Jerry Gallegos, Jr.
- 8       70. Interview Transcript of Margaret Gallegos
- 9       71. Interview Transcript of Melodee Nowatzki
- 10      72. Interview Transcript of Russell Randall
- 11      73. Interview Transcript of Noah Stalvey
- 12      74. Declaration of Sally Ake, 10/28/02
- 13      75. Declaration of Aaron Barrett, 10/22/02
- 14      76. Declaration of Maria Victoria “Vicki” Covarrubiaz, 10/09/02
- 15      77. Declaration of Bruce Diffenderfer, 10/16/17
- 16      78. Declaration of Anthony Duran, 10/13/17
- 17      79. Declaration of Mary Durand, 10/12/17
- 18      80. Declaration of Michelle Emig, 10/22/02
- 19      81. Declaration of Michelle Emig, 10/16/17
- 20      82. Declaration of Hortensia Gallegos, 10/09/02
- 21      83. Declaration of Hortencia Gallegos, 10/16/17
- 22      84. Declaration of Jerry Gallegos, Jr., 10/09/02
- 23      85. Declaration of Jerry Gallegos, Jr., 10/16/17
- 24      86. Declaration of Jerry Gallegos, Sr., 10/09/02
- 25      87. Declaration of Margaret Gallegos, 10/22/02
- 26      88. Declaration of Margaret Gallegos, 10/16/17
- 27      89. Declaration of Melodee Nowatzki, 10/13/17
- 28      90. Declaration of Statia Peakheart, 10/15/17

1           91. Declaration of Russell Randal, 10/22/02  
2           92. Declaration of John Rivas, 10/16/17

3           Petitioner's Objections to Exhibits:

4           Petitioner objects to Respondents exhibits numbered 19, 20, and 35 because  
5           they are not listed as witnesses for either party and they have not previously been  
6           included on any motion for live testimony.

7           Respondents' Objections to Exhibits:

8           Respondents note Petitioner's objection to Exhibits 19, 20, and 35.  
9           Petitioner's experts reviewed these declarations and Respondents may discuss what  
10          the experts have reviewed in forming their opinions. An objection to an exhibit's  
11          *admission* may be made at a salient time during the hearing. (*See* Section VIII.)

12          **VIII. DEPOSITIONS**

13          The parties have stipulated that portions of depositions will be offered only  
14          for impeachment. The parties recognize that many exhibits listed by both are  
15          hearsay. However, to the extent these records were reasonably relied upon by the  
16          experts in forming their opinions, they are admissible for that purpose. *See* Fed. R.  
17          Evid. 703.

18          **IX. PROCEDURES FOR EXPEDITING THE EVIDENTIARY HEARING**

19          The parties have discussed procedures for expediting the hearing. The parties  
20          have stipulated to foundation for the exhibits and will use courtroom technology to  
21          expedite presentation of the evidence.

22          **X. PROBABLE LENGTH OF HEARING**

23          The parties agree that the hearing can be completed within the scheduled  
24          timeframe of November 9-12.

25          **XI. CERTIFICATION**

26          Undersigned counsel for each of the parties in this action do hereby approve  
27          and certify as follows:

28

1. All discovery will be completed before the commencement of the evidentiary hearing.
  2. The identity of each witness has been disclosed to opposing counsel.
  3. Each exhibit listed herein: (a) is in existence, (b) is numbered, and (c) has been disclosed and shown to opposing counsel.

## XII. ADOPTION

The Court may adopt this Joint Proposed Prehearing Order at the Final Prehearing Conference or subsequent hearing.

Respectfully submitted this 15th day of October, 2020.

Mark Brnovich  
Attorney General  
Elizabeth Bingert  
Gregory Hazard  
Assistant Attorneys General

Jon M. Sands  
Federal Public Defender  
Nicole List  
Kush Govani  
Assistant Federal Public Defenders

s/ Elizabeth Bingert  
Elizabeth Bingert  
Counsel for Respondents

s/ Nicole List  
Nicole List  
Counsel for Petitioner

## Certificate of Service

I hereby certify that on October 15, 2020, I electronically filed the foregoing Joint Proposed Prehearing Order with the Clerk's Office by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Kat Esparza  
Assistant Paralegal  
Capital Habeas Unit